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08-1217 (2)

Supreme Court, U.S.
FILED
JUN 18 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

CHRISTOPHER F. KEATING, PETITIONER

v.

JAMES W. ABBOTT, in his personal and professional capacities, AND THE UNIVERSITY OF SOUTH DAKOTA

MOTION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH DAKOTA SUPREME COURT

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CHRISTOPHER F. KEATING, Pro Se
1215 Brunswick Ct
Arnold, MD 21012
(410) 349-1676

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The Petitioner respectfully requests a rehearing on his petition for a writ of certiorari to review the judgment of the South Dakota Supreme Court in this case.

STATEMENT

Petitioner requests the Court to rehear his petition for a writ of certiorari dated March 3, 2009 in the above referenced proceeding.

Petitioner was dismissed from his tenure-track faculty position at the University of South Dakota in June 2004. The university claimed he violated a portion of the collective bargaining agreement between the South Dakota Board of Regents and the university faculty, as represented by the Committee on Higher Education, (the COHE agreement). Petitioner was informed the charge against him was that he violated the 'civility clause' of appendix G of the COHE agreement. Specifically, he made a comment concerning his supervisor in a private email that he sent from his private residence on a Saturday morning during his off hours. It has been uncontested at all times that this was a private email and was not made in the workplace. The university determined

that this comment was uncivil and dismissed Petitioner as a result.

The Circuit Court stated,

> "On June 9, 2004, Keating was given notice in writing by the Director of Physics and by the Vice President of Academic Affairs that USD was considering not renewing his tenure track contract for lack of adherence to the standards of civility required by his contract. On June 29, 2004, President James Abbott notified Keating of his decision not to recommend renewal of his tenure tract contract for the 2004-2005 academic year. President Abbott state that the decision was based upon Keating's failure to adhere to the standards of civility required by his contract." (Appendix, page A-6, first paragraph above grievance 1.)

Defendants never appealed this decision by the court or asked it to reconsider, so it is uncontested that Petitioner was dismissed for the single charge that he violated the civility clause of the COHE Agreement.

Petitioner argues the civility clause is unconstitutional because it is a violation of free speech rights as follows:

- It is a requirement for government employees to sacrifice their freedom of speech in order to obtain employment. This is in violation of consistent decisions on the part of the U.S. Supreme Court.
- It is in violation of decisions by the U.S. Supreme Court which state the government may not pick and choose which speech it will allow.
- Several similar university speech codes have been struck down in recent years by the courts as violations of free speech. No university speech code has ever been found to be constitutional. Some of the prior court decisions include:
    - *Doe v. University of Michigan*, 721 F.Supp. 852 (E.D. Mich. 1989)
    - *Corry v. Stanford*, Superior Court, Santa Clara County, #740309, 1995
    - *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996)

- *UWM Post v. Board of Regents of University of Wisconsin*, 774 F. Supp. 1163 (E.D., Wis. 1991)
- *Dambrot v. Central Michigan University*, 839 F. Supp. 477 (E.D. Mich. 1993)
- *DeJohn v. Temple University*, 537 F.3d 301 (3d. Cir. 2008)

Petitioner argues that the civility clause is unconstitutional because it is vague. Specific instances of vagueness include:

- There is no definition of what constitutes incivility.
- There is no measure of incivility.
- There is no procedure for determining what is, or is not, uncivil.
- There is no instruction on who has authority to determine what is, or isn't, uncivil.
- There is no requirement for uniformity of action.

Petitioner argues the civility clause is unconstitutional on the grounds it is overbroad. Specific instances of overbroad include:

- It is not narrow or precise, giving the administration unlimited authority to restrict and constrain the speech of faculty members.
- It allows the administration to control the speech of faculty members far beyond the confines of employment, even to the point they may control private speech made by a faculty member in their own home and on their own time.
- There is no appeal possible due to the fact that only the administration is allowed to determine what constitutes uncivil speech.

Petitioner originally provided a detailed briefing on the constitutional issues surrounding the civility clause at his administrative hearing in January 2006. This briefing established a prima facie case that the civility clause was

unconstitutional. Defendants had two law firms working for them, neither of which rebutted Petitioner's argument. This briefing was also provided to the South Dakota Attorney General's office in accordance with regulatory requirements to allow the state to rebut the argument. The South Dakota Attorney General's office never made any rebuttal or comment concerning Petitioner's argument.

The South Dakota administrative law judge presiding at Petitioner's administrative hearing was provided this briefing and additional evidence submitted as part of Petitioner's written closing argument. By summary rules, Petitioner should have received a favorable decision due to the establishment of a prima facie case and a failure by the Defendants to rebut that case. Instead, the administrative law judge did not rule on the issue.

Petitioner provided the South Dakota Circuit Court judge all of Petitioner's arguments when he appealed the results of the administrative hearing. Petitioner followed this

with oral arguments at a July 2007 hearing, establishing a prima facie case that the civility clause is unconstitutional. Defendants did not rebut Petitioner's case. By the rules of summary judgment, Petitioner was entitled to a favorable decision by the South Dakota Circuit Court. However, the judge's findings did not address the issue of the civility clause's constitutionality.

Petitioner presented all evidence to the South Dakota Supreme Court and Defendants again failed to rebut Petitioner's legal argument. The South Dakota Supreme Court dismissed Petitioner's appeal and did not make any ruling on the question.

CONCLUSION

This is not a case of Petitioner being disruptive in the workplace. Petitioner was never, at any time, accused of, counseled for, or disciplined for being disruptive in the workplace. Petitioner was never charged with being

disruptive and was never provided any opportunity to defend himself against any such charges. Defendants have never introduced evidence to show Petitioner was disruptive in the workplace. The submitted evidence shows Petitioner received annual Faculty Performance Reports with grades of 'Exceeds Expectations.' The evidence also shows Petitioner was recommended for early promotion and received meritorious pay raises.

The constitutionality of the civility clause is what is being questioned. That is an issue that stands on its own merits and no action, or lack of action, on the part of Petitioner can alter the answer to that question.

By failing to rule on the question of the civility clause's constitutionality, the South Dakota courts gave the University of South Dakota and, by extension, all other universities in South Dakota, the authority to regulate the speech of all faculty members indiscriminately. As it now stands, the COHE agreement and the actions of the courts

give the university administration absolute control over the speech of all faculty members. They now have the authority to rule any speech as being uncivil, no matter what is said, where it is said, or when it is said. They may rule that one faculty member is civil, while another faculty member is uncivil for saying the exact same thing as the first. They may control what faculty members say in private communications, what they say on their own time, and even what they say in the privacy of their own homes. The faculty is aware of this capriciousness, but is powerless to do anything about it except to engage in lengthy and expensive court fights.

This situation will continue to exist until such a time as it is overturned in the courts. Meanwhile, other universities will continue to try to enforce speech codes, resulting in even more cases before the courts.

For all of these reasons, Petitioner requests the Court reconsider its decision on his Petition for a Writ of Certiorari

so that this issue may be heard before the Court and one, all-encompassing decision can be made.

Respectfully submitted.

CHRISTOPHER F. KEATING, pro se
1215 Brunswick Ct
Arnold MD 21012
410 293-6664 (work)
410 443-1813 (cell)

APPENDIX
First Judicial Circuit Court

November 30, 2007

Christopher Keating
167 Bank Stree #3
New London, CT 06320

Robert B. Frieberg
Attorney at Law
P.O. Box 511
Beresord, SD 57004

Re: Keating v. James W. Abbott et. al. Civ. 06-307

Dear Mr. Keating and Mr. Freiberg:

This matter came before the court on appeal from an administrative decision by the Department of Labor and Management ("DOL") denying several grievances and unfair labor practices filed by Christopher Keating ("Keating") arising from his employment at the University of South Dakota. Both parties submitted writeen and oral argument in support of their respective positions. The administrative record consists of hundreds of pages of documents, which the court has now had an opportunity to review; however, there is no transcript of the proceedings and testimony before the DOL. Keating has also made an application to present additional testimony in support of his claims, which the Appellees, James Abbott and the University of South Dakota (hereinafter jointly referred to as "USD") resist.

Failure to Order a Transcript of the Administrative Proceedings

SDCL 1-26-32.2 requires the appellant to order a transcript, or such part of the administrative proceedings he deems necessary for the appeal within ten days after filing the appeal. Keating failed to order any part of the administrative transcript. The court understands that there was a two day hearing before the DOL with testimony from several witnesses, along with one or more prehearing conferences. Keating asserts that the DOL made numerous errors arising from the proceedings from which there are no record. Keating's failure to timely order the transcript under the statute constitutes a waiver of the right to order the transcript and makes the review of several issues presented difficult.

SDCL 1-26-32.2 sets out a timeframe frame for each party to order any portion the transcript. However, the obligation the appellee to order a transcript is only triggered if appellee deems other portions of the transcript are necessary based upon the statement of issues filed or based upon portions of the transcript ordered by appellant. USD has not requested this court to review any issues that were before the DOL.

The rules for ordering a transcript in an administrative appeal are similar to the rules for appeals to the Supreme Court in SDCL 15-26A-48, 15-26A-49, and 15-26A-50. Under its appellate rules the Supreme Court has held that appellant bears the primary responsibility to present a complete record to the reviewing court. In Baltodano v. North Central Health Services, Inc., 508 NW2d 892, 894 (SD 1993), the Court stated:

"We have stated that "the ultimate responsibility for presenting an adequate record on appeal falls upon the appellant." Pearson v. Adams, 279 N.W.2d 674, 676 (S.D.1979). "Failure to timely order a transcript constitutes a waiver of the right to a transcript." SDCL 15-26A-49; Reed v. Heath, 383 N.W.2d 873, 874 (S.D.1986). Where an

appellant waives the right to a transcript by failing to order it, the only review which can take place 'is a review of that portion of the record which was before the circuit court.' Hawkins v. Peterson, 474 N.W.2d 90, 92-93 (S.D.1991). Where the record contains no transcript, the record on appeal is confined to those pleadings and papers transmitted from the circuit court. Reed, 383 N.W.2d at 874 (citing Pearson, 279 N.W.2d at 676; Caneva v. Miners & Merchants Bank, 335 N.W.2d 339, 342 (S.D1983))."

The court will review this appeal based upon the record submitted for the DOL.

Application to Present Additional Evidence

Keating's Application to Present Additional Evidence asserts that he should be permitted to subpoena additional documents not received prior to the administrative hearing. He seeks production of a number of documents that he claims support his issues on appeal. The documents sought consist of emails between various USD employees. In addition, Keating also seeks the notes of Roberta Hakl, a USD employee, who was involved in the investigation of Keating's claims harassment and retaliation by USD.

The record shows that Keating subpoenaed several witnesses, including Hakl on more than one occasion. It is unclear whether the subpoenas were honored, or if an issue was ever addressed by the DOL concerning compliance. Subsequently, Keating served Requests of Production of documents upon USD. The requests included email from USD employee and documents in Hakl's possession. USD responded by stating that ll the requested documents would be made available for inspection and copying, except for Keating's request to inspect documents showing attorney's fees paid by USD to its attorney. Keating moved to compel

production of the attorney's fees, which the DOL denied prior to hearing. Keating does not challenge this ruling.

There is no showing that Keating ever moved o compel the attendance of any witnesses or the production of any documents before the DOL. Further, there is no showing that Keating asserted to the DOL that USD failed to make any of the requested documents available, or that documents were missing. Keting makes several references to discussions during the proceedings before the DOL involving documents or witnesses at issue. The transcript was not ordered and the court is unable to locate documents in the record which support Keating's claims.

SDCL 1-26-34 provides that he circuit court may order additional evidence to e presented to the agency from which an appeal is made upon a showing that the additional evidence is material and that there were good reasons for the failure to present the evidence in the proceedings before the agency. Initially, the court is unable to determine from the record how any of evidence would be material or whether it is cumulative to the evidence presented at the DOL hearing. Moreover, Keating has failed to show that there are good reasons for the failure to either discover or present this evidence before the DOL. For these reasons, the Application to present additional evidence is denied.

Standard of Review

The court reviews the administrative decision as set forth in SDCL 1-26-36. The court accords great weight to the findings and inferences made by the hearing examiner on factual questions. Clarkson & Co. v. Harding County, 1998 SD 74, ¶5, 581 NW2d 499, 501. When the issue is a question of fact, the Court reviews the administrative agency's findings under a clearly erroneous standard. Petersen v. Hinky Dinky, 515 NW2d 226, 231 (SD 1994). Questions of law are fully reviewable de novo and no deference is to be

given to the administrative agency's conclusions. Thomas v. Custer State Hospital, 511 NW2d 576 (SD 1994); Petersen v. Hinky Dinky, 515 NW2d 226 (SD 1994); Johnson v. Skelly Oil Co, 359 NW2d 130 (SD 1984). It is within the province of the court to interpret statutes without assistance from the agency. Permann, supra.

Issues on Appeal

Keating filed five grievances against USD arising from the non-renewal of his tenure track contract with USD. Each grievance was filed pursuant to the Counsel of Higher Education Agreement (COHE)[1], which is the collective bargaining agreement governing Keating's employment with USD. Each grievance was denied in the final stage of the grievance process before the South Dakota Board of Regents. The DOL also denied each of the grievances on appeal to the agency. Keating claims that the DOL erred in this determination and also asserts that the DOL erred in denying his two unfair labor practices claims against USD. Finally, Keating also asserts that the DOL's decision was made upon unlawful procedure because the administrative law judge engaged in "judicial bias" toward him. This claim was not raised by Keating before the DOL.

[1]The COHE agreement in force as the time of the nonrenewal was for the period of 2002 to 2005. Although a new COHE agreement in currently in effect, the court refers to the COHE agreement in a present tense because the provisions at issue are unchanged in the subsequent agreement.

Keating was employed as a tenure track Associate Professor of physics at USD beginning in the 1999-2000 academic year. Before each academic year, Keating signed a one year written contract with USD providing that this employment would terminate at the end of each academic year, subject to the right to renew the contract at the sole

discretion of USD. Keating signed a one year contract each year through the 2003-2004 academic year.

On June 9, 2004, Keating was given notice in writing by the Director of Physics and by the Vice President of Academic Affairs that USD was considering not renewing his tenure track contract for lack of adherence to the standards of civility required by his contract. On June 29, 2004, President James Abbott notified Keating of his decision not to recommend renewal of his tenure tract contract for the 2004-2005 academic year. President Abbott state that the decision was based upon Keating's failure to adhere to the standards of civility required by his contract. President Abbott extended Keating an offer of a one year term contract for the following academic year. Keating accepted this offer and taught for another year under the one year term contract.

Grievance 1: That the non-renewal of his tenure track contract with USD was disciplinary action and USD failed to follow Sections 8.6 and 15 of the COHE agreement in taking this action.

Keating argues that because USD cited a reason for the non-renewal of his tenure track agreement that the action was disciplinary in nature and required USD to follow Section 15 of the COHE Agreement addressing "discipline" and "just cause" termination of an employee. Keating argues that Section 8.6 relied upon by USD for non-renewal of his contract was not proper because USD terminated his contract for cause.

The DOL found and Keating does not dispute he was employed by USD under the terms of a nine month tenure track contract as a physics professor for the 2003/2004 academic year. The DOL also found that Keating's contract with USD was not renewed based upon the June 29, 2004

decision of President Abbott. These facts are supported by the record before the court.

The court has reviewed the DOL's written decision and legal conclusions based upon these facts. The DOL decision properly reads the provisions of the COHE contract relating to non-renewal of a tenure track contract. The CHOE agreement is clear that "None-renewal is not a disciplinary action." Further the COHE agreement specifically state that the "notice will state the reasons for the decision" not to renew. The uncontested facts and plain terms of the COHE agreement show that the action taken by USD was a non-renewal of Keating's contract. Keating does not cite any authority, nor is there any language in the COHE Agreement supporting his claims. The court adopts and affirms the findings of fact and conclusions of law entered by the DOL on this issue.

Grievance 2: That the non-renewal of Keating's contract with USD was in retaliation for his participation in a grievance claim made against his supervisor, Christina Keller ("Keller") in the fall of 2003;

Keating claims that the DOL erred in determining that the non-renewal of his contract was not in retaliation for the grievance which he filed against Keller. The written documents in the record show that Keating filed his grievance against his supervisor in September 2003 alleging harassment and retaliation. On May 6, 2004 Hakl found no violations by Keller. The non-renewal of Keating's contract was initiated in June of 2004. Citing Leslie v. Hy-Vee Foods, Inc., 2004 SD 59, para 11, 679 NW2d 785 the DOL determined that the filing of the grievance against his supervisor was a protected activity and that Keating suffered an adverse employment action subsequent to his filing the grievance. However, the DOL found that Keating failed to show a causal connection between the protected activity and

the adverse employment action, a necessary third element to establish a prima facie case of retaliation. Despite the determination that Keating failed to show a prima facie case of retaliation, the DOL went on to find that USD had a legitimate non-discriminatory reason for the non-renewal.

Leslie does not discuss the quantum of proof necessary for a claimant to initially establish a prima facie case of discrimination or retaliation. The Eighth Circuit, which uses the same burden shifting analysis as Leslie for a claim of retaliation has discussed the quantum of proof for a prima facie case on a number of occasions. In Stewart v. Independent School District No. 196, 481 F3d 1034, 1043 (8th Cir. 2007), the court stated:

We have described the actual evidentiary burden that a plaintiff must meet at the prima facie stage as "minimal." Logan, 416 F.3d at 881. Where the evidence is not strong, that evidence, standing alone, may be insufficient to sustain the plaintiff's case at the final stage of the burden-shifting analysis. See id at 881...

Taken together, these cases demonstrate that the burden-shifting framework is merely an analytical construct: the ultimate burden of proving retaliation remains at all times with the plaintiff; and the level of proof required to show causation is less at the prima facie stage than at the final stage of the McDonnell Douglas analysis. As such, if an employer has articulated a legitimate reason for its actions, it is permissible for courts to presume the existence of a prima facie case and move directly to the issue of pretext and the determination issue of causation when bypassing the prima facie case analysis leads to clarity in framing the issues under review.

The DOL found "Keating did not produce any evidence or a single witness in support of his version of the

facts." The DOL also found Keating's testimony was not credible. The DOL also made findings concerning USD's stated reason for non-renewal:

"the evidence does provide the support for USD's decision. The evidence proves that Keating did not adhere to the civility standards set forth in Appendix G to the COHE Agreement. All of Keating's own witnesses affirmed the facts that he was uncivil, uncooperative, unreasonable in his demands, and disruptive during his employment. Further, these witnesses established that he was unwilling to accept any suggestions from others to improve his behavior."

Keating has failed to submit anything to show these findings are in error and the written documentation in the record supports the DOL's findings. The findings are not clearly erroneous. Even applying the presumption that a prima facie case of retaliation existed, Keataing has failed to meet his ultimate burden to show retaliation on this record as USD had a legitimate non-discriminatory reason for the non-renewal. The court adopts and affirms the findings of fact and conclusions of law by the DOL, except that the court clarifies its conclusion that even under a presumption that a prima facie case of retaliation occurred, Keating has failed to meet his burden of show retaliation because USD had a legitimate nondiscriminatory reason for the non-renewal.

Grievance 3: That Keating's years of service were improperly calculated and as a result USD failed to follow the proper procedure for the non-renewal of his contract, and that if the years of service were properly calculated, USD had no authority to non-renew Keating contract under COHE.

Keating alleges that that he had less than four years of service at the time his contract was not renewed and was entitled by notice of his non-renewal by December 15 under

Section 8.6(2). The DOL determined that Keating had more than four years of service and was entitled to notice by April 1 under Section 8.6(3), which although untimely, Keating was not entitled to any additional remedy for the late notice. There is no dispute that USD's notice of non-renewal of Keating's contract was late because the Keating was not given notice until June of 2004.

Despite the belated notice, the DOL determined that Keating was given a one year term contract following the notice of non-renewal consistent with Section 8.6(3) and because the COHE agreement did not provide any other remedy or penalty for late notice under Section 8.6(3), the late notice did prejudice Keating. Keating argues that because of two leaves of absence of military service during his time at USD he had less than four years of service and that he was prejudiced by the late nonrenwal notice.

The first question is whether Keating was entitled to notice of nonrenewal under Section 8.6(2) (2-4 years of service) or under Section 8.6(3) (more than four years of service). The DOL determined that Keating received five tenure track contracts before he was non-renewed in June 2004 and thus had more than four years of completed service at the time of nonrenewal. The DOL found that Keating had two separate military leaves while under contract with USD. The DOL found the first leave to be eight months and days during 2001/2002 and the second leave to be two months and one day in 2003. This totals to more than one academic year and would leave Keating with 3.86 years of service as of completing his fifth year in 2003/2004 as noted by the DOL.

Keating does not dispute the DOL's findings. The issue is whether the DOL properly applied these facts to the express terms of the COHE agreement. Section 21.4 provides that faculty members are eligible to request unpaid leave for required military service. The second paragraph of Section

13.2 provides that "[t]enure track service credit is not earned during a period of leave of absence..." This paragraph further states, "Full-time assignment to off campus duties in the service of private industry or government is treated as a leave of absence..." The subsections under Section 8.6 discussing timely notice of nonrenewal calculates the number of years based upon the "years of service under a tenure track contract". The COHE agreement is clear that number of years is not based upon the number of contracts signed, but rather based upon the actual time of service under the contracts. Deducting the two leaves of absence taken by Keating as required by the COHE agreement shows that Keating had less than 4 years of service as of the time he completed his fifth contract year. The DOL erred in determining that Keating had more than four years service based upon the clear terms of the COHE agreement.

Having determined that Keating had less than four years of service as defined by COHE, he was entitled to the notice under Section 8.6(2) requiring notice by December 15. The notice was not given to Keating until at least June 9. Section 8.6(4) provides the remedy for a late nonrenewal of an employee with less than four years of service as either a (1) payment for twice the number of working days the notice is late, or (2) a contract for such length of time. The notice to Keating was late by half of the academic year. Keating was offered and received a subsequent term contract for an entire academic year. Although the language of Section 8.6(4) bases the length of the contract upon the number of "working day' the notice was late, Keating has failed to show that the one year term contract he was offered was less than twice the number of working days the notice was late. Keaating has failed to meet his burden toi show that USD's violation of the procedural requirements of the COHE agreement resulted in any prejudice to him. See, Beville v. University of South Dakota, 420 NW2d 9, 14 (SD 1988).

Because Keating had less than four years of service, it is unnecessary to determine whether USD was required to offer Keating another tenure track employment contract for 2004/2005 b ecause of the untimely notice under Section 8.6(4) (more than four years of service). The court affirms the decision of the DOL under this section, but modifies the conclusions of law for the reasons set forth herein.

Grievance 4: That USD failed to fairly and adequately apply the COHE agreement, and I doing so should commence disciplinary actions against Keller.

The written decision of the DOL states that Keating's claim "that the COHE Agreement had been inequitably applied was denied for lack of evidence of any inequitable application of ny terms of the COHE Agreement." This decision is incorporated into the Findings of Fact and Conclusions of Law. It appears that the determination of this issue occurred during the hearing before the DOL for which the court does not have a transcript.

Keating fails to allege any specific error by the DOL in its determination of "lack of evidence of any inequitable application of the any terms of the COHE Agreement." The court does not find any error based upon its review of the record. The court affirm's the DOL's decision on this issue and adopts the DOL's Findings of Fact and Conclusions of Law on this issue.

Grievance 5: That Keating was discriminated against by USD because of his veteran status.

The written decision of the DOL states as to this grievance that "[d]uring the hearing before the Department, Keating's allegation that he had been denied veteran's preference was denied as untimely." Keating does not assert any specific error as to the DOL's determination on this

issue, nor has he presented any part of the record showing that this determination was in error.

The court also notes the DOL's decision on the claim of retaliation by Keating in which the DOL found that USD had a legitimate non-discriminatory reason for Keating's non-renewal. There is no finding, nor is there any evidence in the record before this court that Keating's veteran status had anything to do with his non-renewal. The court affirms the DOL on this issue and adopts the DOL's Findings of Fact and Conclusions of Law on this issue.

Unfair Labor Practice #1: That USD committed an unfair labor practice and violated his Constitutional Right of Free Speech under the First Amendment by invoking the "civility clause" of the COHE Agreement against Keating.

Keating asserts that USD committed an unfair labor practice under SDCL 3-18-3.1(1) by denying his free speech rights guaranteed by the First Amendment to the Constitution. If true, such a claim is the proper basis for an unfair labor practice under the statute, which prohibits a public employer from interfering with, restraining, or coercing "employees in the exercise of rights guaranteed by law." It is unclear from the record what "protected" statements Keating claims led to his non-renewal. The only specific statement Keating asserts in his brief and at oral argument was his email to the chairman of the department, Timothy Heaton, calling Keller a "liein (sic) backstabbing sneak".

In Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) the United States Supreme Court recognizes that a state cannot condition public employment on a basis that infringes upon an employee's constitutional free speech rights. Pick3ering and the cases following w:st="on"Pickering have developed a four step

analysis to determine whether an employee's right to free speech is violated.

Initially, the trial court must determine the threshold issue of whether the employee's speech is a matter of public concern. Rankin v. McPherson, 483 U.S. 378, 146 (1987); Connick v. Myers, 461 U.S. 138, 146 (1983). This involves an examination of the content, form, and context of the speech. Ranking, 483 U.S. At 384-85. The court must then weigh the interests of the public employee against the interest of the public employer, again considering the context and circumstances of the speech. Ranking, 483 U.S. At 388. Both of these steps are questions of law for the trial court. Burnham v. U.S. At 388. Both of these steps are questions of law for the trial court. Burn v. Ianni, 119 F.3d 668, 679 (8th Cir. 1997); Kincade v. City of Blue Springs, 64 F.3d 389, 395 (8th Cir. 1995). Only after the court determines the first two issues does the fact-finder make a determination in the third step of whether the protected speech played a substantial role in the employment decision. Mt. Healthy City School Bd v. Doyle, 429 U.S. 274, 287 (1977). If so, the employer has the burden in the fourth step to prove that I would have reached the same decision in the absence of the protected speech. Id. At 287.

The email message containing the remark about Keller does not reflect any matter of public concern. Rather, the email only involves a discussion of employee relationship issues between Keating and others in the Department. As the Court in Connick, 461 U.S. At 147 stated such communications are not made "as a citizen upon matters of public concern, but instead as an employee upon matters of only a personal interest."

The DOL determined that "Keating's criticism of his supervisors did not rise to the level of speech protected by the First Amendment". This court does not find any error in this

determination. Keating has failed to present any testimony from the DOL hearing to show that any statements he made involved a matter of public concern. Further, Keating specifically acknowledged to this court at the time of the oral arguments that the email containing the derogatory comment about Keller was a private communication made from his home to the department chair. He argued that he did intend the email to be a public communication.

Because Keating failed to meet the first prong of Pickering his free speech claim must fail and there was no violation of SDCL 3-18-3.1(1). The court affirms the decision of the DOL on this issue for the reasons stated herein.

Unfair Labor Practice 2: That USD committed an unfair labor practice b dismissing him in retaliation for filing a grievance against Keller.

Keating's claim of an unfair labor practice for retaliation is the identical issue he raises in his second grievance. For the reasons set forth therein the court affirms the denial of the claim for retaliation and adopts the DOL's findings and conclusions, except as modified in the discussion above in Grievance 2.

Whether the Department enganed in "judicial bias" or other unlawful procedure in determining Keating's appeal.

Keating asserts that the administrative law judge was biased toward him in handling of the hearing and in the decision rendered. Keating makes several complaints about the administrative law judge's bias toward him during the hearing. The court does not have the transcript of the hearing supporting such claims and there is no showing that any such

claims were asserted by Keating at the time of the administrative hearing.

In Gilkyson v. Wheelchair Express, 579 NW2d 1 (SD 1998) the Court held that party waives a claim of judicial misconduct by failing to raise the issue at he time of trial. Gilkyson Court stated the rationale for this rule as follows:

The affidavits containing Wheelchair Express' version of the objectionable facts were filed well after the completion o the trial, thus denying the plaintiff the chance to be timely heard on the matter. In addition, it denied the trial court the opportunity to consider an objection and take whatever measures it felt were necessary, if any, to correct the situation. Id. At 4.

The court does not find any basis for a claim of judicial bias or misconduct by the administrative law judge during the hearing, but such claims were waived by failing to assert such a claim at the time of hearing.

Keating also argues judicial bias or misconduct in the written ruling from the Department. It appears that the bulk of Keating's complains about the administrative law judge simply reflect his disagreement with the ruling by the Department. This does not create a basis for asserting a claim of judicial bias or misconduct. The Court in State v. Page, 709 NW2d 739, 750 (SD 2006) stated, "As we have consistently stated, this Court presumes a judge was impartial absent a specific and substantial showing to the contrary." The Page Court further cited Canon 3E(1)(a) of the Code of Judicial Conduct occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."

Keating disagreement or disappointment with the DOL's decision does not create a basis to assert judicial bias. The written decision, findings and conclusions of the Department do not demonstrate any judicial bias by the DOL toward Keating. The decision is well supported by the record before this court. The court finds absolutely no basis in this record to support Keating's claims of judicial bias or misconduct.

For all the reasons set forth herein the court affirms the decision of the Department. The court requests Mr. Frieberg to prepare findings of fact, conclusions of law and a judgment consistent with this ruling.

Sincerely your,
Steven R. Jensen
Circuit Court Judge

ORDERED that the Application to Present Additional Evidence is denied.

Dated this 2nd day of January, 2008

BY THE COURT:
Steven R. Jensen, Judge
Circuit Court